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Supreme Court, U.S.
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No. 89-

In The
Supreme Court of the United States

October Term, 1989

H. K. PORTER COMPANY, INC.,
Petitioner,

v.

TRANSAMERICA INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

1. Where the lower federal courts, sitting in diversity, improperly shifted the state insurance law burden of proof and thereby foreclosed insurance coverage that would have permitted petitioner to compensate tens of thousands of asbestos claimants, should this Court exercise its supervisory power and reverse so as to prevent a serious impairment of the administration of justice in the federal courts?

2. Where the District Court abused its discretion in applying the Federal Rules of Evidence, thereby compounding the impact of erroneous decisions regarding the state insurance law burden of proof, should this Court exercise its supervisory power and reverse?

II. LIST OF PARTIES

The only parties to this proceeding are those identified in the caption. H. K. Porter Company, Inc., is a wholly-owned subsidiary of Sewickley Company, a Delaware corporation. Porter has no subsidiaries other than wholly-owned subsidiaries.

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IV. OPINIONS OF THE COURTS BELOW

The Order of the United States Court of Appeals for the Third Circuit denying Petitioner's Petition for Rehearing and Rehearing In Banc, dated November 9, 1989, is unreported and is reproduced in the Appendix. 9a. The Judgment Order of the United States Court of Appeals for the Third Circuit, dated September 28, 1989, is not reported and is reproduced in the Appendix. 1a.

The Order of the United States District Court for the Western District of Pennsylvania, dated February 27, 1989, is unreported and is reproduced in the Appendix. 3a. The Memorandum Order of the United States District Court for the Western District of Pennsylvania, dated February 11, 1989, is not reported and is reproduced in the Appendix. 4a.

V. JURISDICTIONAL STATEMENT

The Judgment Order of the United States Court of Appeals for the Third Circuit is dated September 28, 1989. 1a. The Order of the United States Court of Appeals denying Petitioner's Petition for Rehearing In Banc is dated November 9, 1989. 9a.

This Honorable Court has jurisdiction by writ of certiorari pursuant to 28 U.S.C. § 1254(1) (1982):

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of a judgment or decree . . . .

VI. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Tenth Amendment to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. Amend. X.

Article III, Section II, clause 1 of the Constitution of the United States provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -to all Cases affecting Ambassadors, other public Ministers and Consuls; -to all Cases of admiralty and maritime jurisdiction; -to Controversies to which the United States shall be a Party; -to Controversies between two or more States; -between a State and Citizens of another State; -between Citizens of different States; -between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const., art. III, § 2, cl. 1.

The Rules of Decision Act provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652 (1982).

Federal Rule of Evidence 901 provides:

(a) **General provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) **Testimony of witness with knowledge.** Testimony that a matter is what is claimed to be.

(2) **Nonexpert opinion on handwriting.** Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) **Comparison by trier or expert witness.** Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) **Distinctive characteristics and the like.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) **Voice identification.** Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) **Telephone conversations.** Telephone conversations, by evidence that a call was made to

the number assigned at the time by the telephone company to a particular person or business, if (a) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (b) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) **Public records or reports.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) **Ancient documents or data compilation.** Evidence that a document or data compilation, in any form, (a) is in such condition as to create no suspicion concerning its authenticity, (b) was in a place where it, if authentic, would likely be, and (c) has been in existence 20 years or more at the time it is offered.

(9) **Process or system.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) **Methods provided by statute or rule.** Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

Fed. R. Evid. 901.

VII. STATEMENT OF THE CASE

H. K. Porter Company, Inc. ("Porter"), seeks certiorari to review a judgment of the United States Court of Appeals for the Third Circuit affirming a declaratory judgment that certain insurance policies do not provide Porter with any additional coverage for the tens of thousands of asbestos-related disease claims pending against Porter.

Porter has been named as a defendant in claims by approximately 100,000 individuals who allege they have suffered illness or death as a result of exposure to products containing asbestos. Although Porter has settled tens of thousands of asbestos claims, more than 60,000 of them are still pending. In the vast majority of these cases, Porter's alleged liability is predicated on its status as the corporate successor to Thermoid Company ("Thermoid"), a former manufacturer of asbestos products that Porter acquired in 1958.[1] As is typical in asbestos cases, many of the claims against Porter allege that the plaintiff's injuries began during his or her use of asbestos in the 1950s or earlier. As part of its effort to satisfy these claims, Porter has sought coverage under the liability insurance program that Thermoid had in place in the early 1950s.

During the winter of 1983-84, Porter learned that two liability insurance policies had been issued to Thermoid in 1952 and 1953 by Manufacturers' Casualty Insurance Company, the corporate predecessor of Respondent, Transamerica Insurance Company ("Transamerica"). On February 27, 1984, Porter brought this diversity action

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[1]On December 11, 1958, Thermoid Company, a Delaware corporation, and H. K. Porter Company, a Pennsylvania corporation, were merged into H. K. Porter Company, a Delaware corporation, which simultaneously changed its name to H. K. Porter Company, Inc., the Petitioner.

against Transamerica, seeking a declaration of Porter's rights to coverage for asbestos-related bodily injury claims under Transamerica's 1952 and 1953 policies ("the Policies").[2]

The originals and all known copies of the Policies are lost. Nevertheless, in the District Court, the parties stipulated to the following facts regarding the Policies:

(i) The Policies were issued to Thermoid by Transamerica's predecessor;

(ii) One of the Policies (No. LB-1729) is effective for the time period January 1, 1952 through January 1, 1953; the other Policy (No. LAB-1124) is effective for the time period January 1, 1953 to January 1, 1954;

(iii) Each policy covers bodily injury product liability claims, including asbestos claims;

(iv) Authentic copies of a "specimen" form of the Policies were admitted into evidence; those forms set forth the basic provisions of the insurance contracts, except that they were blank as regards names, dates, dollar amounts, limits, and the like; and

(v) The per person limit of Transamerica's liability (for bodily injury product claims) under each Policy was $50,000; the corresponding per accident limit for each Policy was $100,000.

Thus, before the case was submitted to the jury, the parties had stipulated to the issuance of the Policies, the name of the insurer, the name of the insured, the policy numbers,

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[2]The jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked pursuant to 28 U.S.C. § 1332 (1982).

the periods of coverage, the existence of product liability coverage, and the applicable per person and per accident limits of liability. There was no stipulation concerning aggregate limits.

After Porter instituted this lawsuit, but before trial, Transamerica paid $200,000 under the Policies on Porter's asbestos claims. These payments appear to reflect Transamerica's recognition, consistent with its position in the case at bar, that the Policies required Transamerica to pay Porter's asbestos claims, at least up to the $100,000 per year aggregate limit that Transamerica contends is a part of each of the Policies. Accordingly, the dispute in this lawsuit centers on whether the Policies contain a $100,000 annual aggregate liability limit or have no aggregate liability limit. Porter has argued that while each individual asbestos claim is subject to the Policies' per person and per accident limits, the Policies have no aggregate limit and thus do not restrict the number of asbestos claims that Transamerica is obliged to cover. For its part, Transamerica contends that each of the Policies has a $100,000 annual aggregate limit and that, because it has paid that amount on Porter's asbestos claims, it has no additional coverage obligations.

Because the Policies are lost, and due to the passage of nearly 40 years, the parties offered relatively little direct evidence at trial on the aggregate limit issue. The District Court's jury instruction on burden of proof, therefore, was of critical importance. Paradoxically, although Transamerica was relying upon the existence of an aggregate limit as an affirmative coverage defense, the District Court instructed that it was *Porter* that bore the burden of proof, that is, the burden of establishing the *nonexistence* of an aggregate limit. Moreover, the District Court held that

Porter had to meet its burden of proof by the "clear and convincing evidence" standard.

Transamerica's trial position relied extensively upon the introduction of documents that Transamerica asserted were product liability underwriting manuals prepared by the National Bureau of Casualty Underwriters (the "Bureau") for the years 1951, 1952 and 1953. Transamerica asserted that the manuals demonstrated an industry-wide practice among insurance underwriters in 1951, 1952 and 1953 to *always* set aggregate limits when writing products liability coverage.

Porter objected to the admission of the purported underwriting manuals because they had not properly been authenticated. The District Court, however, admitted the manuals into evidence over Porter's objection.

At the conclusion of the trial, the jury returned a special verdict in which it answered the following interrogatory in the negative:

> Do you find that the [policies] did not contain an aggregate limitation of liability for bodily injury product liability claims?

Because the jury concluded that the Policies contained applicable aggregate limits, the District Court entered a final judgment in favor of Transamerica "declaring that the blanket liability policies . . . did not provide unlimited aggregate liability coverage for bodily injury product liability claims." 3a.

VIII. REASONS FOR ALLOWANCE OF THE WRIT

A. Unless it is Reversed, the Lower Courts' Improper Shifting of the State Insurance Law Burden of Proof Will Foreclose Insurance Coverage That Would Permit Petitioner to Compensate Tens of Thousands of Asbestos Claimants and Will Seriously Impair the Administration of Justice in the Federal Courts.

Because of the enormous number of cases in which claimants contend that they have been injured by exposure to products containing asbestos, the importance of the issues involved in this case cannot be overstated.[3] The instant insurance coverage case, which arises as a direct result of the thousands of asbestos bodily injury lawsuits that are clogging federal and state court dockets throughout the United States,[4] is an appropriate vehicle by which this Court can begin to address the asbestos litigation logjam.

Federal appellate court decisions rendered during the 1970s nurtured the growth of asbestos litigation. For example, in *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), the Fifth Circuit held that manufacturers of asbestos-containing products could be held jointly and severally liable for asbestos-related diseases that were caused, in part, by their products. After *Borel*, an increasing number of asbestos victims began to file claims.[5] By 1981, approximately

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[3]*See Asbestos: The Saga Drags On*, N.Y. Times, April 2, 1989, § 3, at 1, col. 4 (hereinafter *"Asbestos"*).

[4]*Id.* "[A]sbestos-related claims continue to pour into courts at a rate of well over 1,000 a month . . . . As a result, the courts' backlog, already the biggest in product liability history, is growing."

[5]In *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1215 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981), *reh'g*

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12,000 product liability claims against asbestos manufacturers had been filed in state and federal courts, and the number of cases was then increasing at the rate of 400 per month.[6] At that time, estimates of the total of potential recoveries against asbestos products manufacturers ran into hundreds of millions of dollars.[7]

During the 1980s the number of asbestos cases rose almost beyond belief. Currently, more than 100,000 claimants nationwide allege asbestos-related injuries.[8] The

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denied, 455 U.S. 1009 (1982), the Court of Appeals stated that *Borel* precipitated "an avalanche of lawsuits against the entire asbestos manufacturing industry."

[6]*Asbestos Injury Suits Mount, With Severe Business Impact*, N.Y. Times, July 3, 1981, § 1, at 1, col. 1.

[7]*See* Legal Times of Washington, October 12, 1981, at 1, col. 1.

[8]*See Asbestos* at 1, col. 4 through p. 11, col. 6. The onslaught of asbestos-related litigation has been borne by large and small companies alike, including the following: AAER Sprayed Insulation; Abex Corp.; AC&S, Inc.; American Asbestos Textile Corp.; Anchor Packing; Armstrong Cork Co.; Architectural Sales, Inc.; Armstrong World Industries; Asbestos Corporation, LTD.; Babcock & Wilcox; Bell Asbestos; Capasco, LTD.; Cape Industries, P.L.C.; Carey Canada, Inc.; Celotex Corp.; Charter Consolidated, P.L.C.; Combustion Engineering, Inc.; Continental Products Corporation (CPC); E.I. du Pont de Nemours and Company; Eagle-Picher Industries; Forty-Eight Insulations, Inc.; Fibreboard Corp.; Flintkote Corp.; GAF Corp.; Johns-Manville Corp.; Johns-Manville Sales Corp.; Kaiser Gypsum Co.; Keene Corp.; Lake Asbestos of Quebec (LAQ); MacArthur Company: National Gypsum Co.; North American Asbestos Corp. (NAAC); Nicolet, Inc.; Owens-Corning Fiberglas Corp.; Owens-Illinois Corp.; Owens-Illinois, Inc.; Philip Carey/Celotex; Philip Carey Manufacturing Co.; Pittsburgh Corning Corporation; Porter Hayden Company; Proko Industries; Raymark Industries, Inc.; Raytech Corp.; Smith Chemical and Color, Incorporated; Southern Textile; Thorpe Insulation Company; Turner Asbestos Fibres LTD.; Turner & Newall LTD.; Turner & Newall PLC; Union Asbestos & Rubber Co. (UNARCO); Union Carbide; Uniroyal Co.; United States Gypsum Co.; UNR Industies; United States Gypsum

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figures are equally staggering when examined from the perspective of the particular defendant companies. For example, by early 1984, more than 16,000 asbestos-related claims representing 20,000 claimants had been asserted against Porter. Since then the number has increased dramatically, and today it is estimated that 100,000 asbestos bodily injury claims have been made against Porter, some 60,000 of which are pending.

This flood of asbestos claims has resulted in heretofore unimaginable, and sometimes overwhelming, financial liabilities for former manufacturers of asbestos products.[9] Consequently, issues involving the existence and extent of insurance coverage for asbestos claims are vitally important to the scores of companies confronted with the massive asbestos liability. In many instances, insurance issues have contributed to an asbestos manufacturer's decision to file for bankruptcy.[10]

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Co.; U.S. Mineral Products Co.; W.R. Grace; Western MacArthur Company; Wilkin Insulation Co.; Wilkin Properties Co. *See*, 3 *Mealey's Litigation Rep.: Asbestos* (Feb. 1988-July 1988 Cumulative Index); 4 *Mealey's Litigation Rep.: Asbestos* (Feb. 1989-July 1989 Cumulative Index).

[9]*Asbestos*, at 1, col. 4. Prior to filing for protection under Chapter 11 of the United States Bankruptcy Code, UNR Industries was said to be incurring asbestos litigation expenses in excess of $1 million per month. The massive financial strain associated with asbestos litigation forced two other former manufacturers of asbestos products, Nicolet Inc. and Forty-Eight Insulations, Inc., to liquidate. *Id.*

[10]Several former manufacturers of asbestos products have filed for protection under Chapter 11 of the United States Bankruptcy Code, including Johns-Manville Corp. (1982), UNR Industries (1982), Amatex Corporation (1982) and Raytech Inc. (1989). Other companies, overwhelmed by asbestos-related liability, have been liquidated, including Nicolet Inc. and Forty-Eight Insulations, Inc. *Id.*

Proper resolution of insurance coverage issues is important not only to the manufacturers of asbestos products, but also to the injured asbestos victims. Erroneous insurance coverage decisions, such as in the instant case, can preclude policyholders like Porter from drawing upon critical product liability insurance coverage. Depending upon their other financial resources, policyholders may have no other means of satisfying the claims of asbestos victims who, of course, are the ultimate beneficiaries of any decision declaring product liability coverage in favor of a former asbestos manufacturer. In a sense, therefore, former asbestos manufacturers seeking a declaration of product liability coverage are "representing" tens of thousands of asbestos victims.[11]

Moreover, incorrect insurance coverage decisions can exacerbate the asbestos case backlogs that are clogging dockets across the country and hindering the administration of justice in the federal courts.[12] In April, 1989, *The New York Times* commented that, while asbestos defendants have always had differing settlement strategies,

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[11]In ruling that the non-party claimants were not indispensable parties to this lawsuit, the District Court found that Porter could be counted on, in a sense, to represent the claimants' interests, stating, "As non-parties, [the claimants] cannot be bound by a judgment in this case, and as a practical matter, [H.K. Porter Company, Inc.], who faces depletion of its assets if defendant is held not to have an obligation to indemnify it, will defend vigorously their interest in preserving as large a fund as possible to satisfy their claims .... If plaintiff prevails, it has a larger fund available from which to satisfy the injured parties' claims. True, if H.K. Porter loses in this action, the fund of money to satisfy claims will be lesser, but H.K. Porter, who must satisfy those claims or enter bankruptcy, has great incentive to protect the claimants' interest in this action." 5a-6a.

[12]According to recent figures, approximately 10,000 asbestos suits, many of which represent thousands of claimants, are pending in federal courts. *Asbestos*, at 11, col. 3-4.

"[m]any with extensive insurance coverage have sought to settle complaints quickly. Those with fewer resources have often taken a tougher stand."[13] The availability of insurance coverage for asbestos claims, therefore, has an important impact on judicial efforts to unclog the asbestos case jam that is slowing the work of America's federal and state courts, a problem that has been exacerbated during the past eighteen months by the demise of the Asbestos Claims Facility.[14]

The implications raised by this case, therefore, are important and pervasive. Facing tremendous liabilities arising out of their asbestos-containing products, and given the plaintiffs' allegations of asbestos product use over many decades, policyholders such as Porter have been forced to seek coverage under product liability insurance policies that were issued decades ago. In many of these cases, neither the policyholders nor the insurers have maintained copies of these policies.[15] Under corporate document retention/destruction policies, these documents often have been discarded by both the policyholders and the insurers. In other instances, the policies simply have

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[13]*Id.* at 11, col. 5.

[14]The Asbestos Claims Facility, which "brought together 36 asbestos manufacturers and 16 insurers in an attempt to settle claims before they reached litigation," broke up in 1988. *Id.*

[15]*See, e.g., Keene Corp. v. Insurance Co. of N. Am.*, 513 F. Supp. 47 (D. D.C. 1981), *rev'd*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), *reh'g denied*, 456 U.S. 951 (1982). In the *Keene* litigation, among the issues raised was whether one of the insurers had issued product liability coverage to the plaintiff between 1948 and 1959. Predictably, although there were indications that liability policies of some sort had been issued to cover the period in question, copies of the policies could not be found. *See also, C.F.W. Constr. v. Travelers Ins. Co.*, 363 F.2d 557 (5th Cir. 1966); *Safeco Ins. Co. of Am. v. Great Am. Ins. Co.*, No. 87-664-JU (D. Or. Jan. 16, 1990); *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich. 1988).

been lost. Thus, policyholders frequently face the difficult challenge of proving, through secondary evidence, the existence of insurance coverage purchased twenty to forty years earlier.

The policyholders' success or failure in proving the existence of historic insurance coverage may determine whether they are able to satisfy claims in the underlying asbestos cases. Thus, the burden of proving the existence and terms of lost insurance policies, as well as the quantum of proof necessary to meet the burden, have gained extraordinary significance for those liability insurance policyholders who are faced with the asbestos claims. Not surprisingly, in cases such as this one, the assignment of the burden of proof and the determination of the necessary quantum of evidence can effectively determine the outcome of the litigation.

Petitioner is aware of this Court's inclination to address errors involving federal courts' application of state law only in exceptional cases. As this Court stated in *Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944), "[O]rdinarily we accept and therefore do not review, *save in exceptional cases*, the considered determination of questions of state law by intermediate federal appellate courts" (emphasis added). The egregiousness of the lower courts' errors in this case, together with the earlier-discussed importance of the questions presented herein, renders this an "exceptional case" which this Court should review.

The lower courts' decision to place the burden of proving the nonexistence of an insurance policy coverage limitation on Porter contradicts the established insurance

law of Pennsylvania, New Jersey and other states.[16] Under Pennsylvania and New Jersey law, the burden of proving insurance policy limitations, exceptions, exclusions, and restrictions rests with the party that raises such affirmative defenses. *Mattocks v. Daylin Inc.*, 452 F. Supp. 512, 514 (W.D. Pa. 1978), *aff'd*, 614 F.2d 769 (3d Cir. 1979); *Miller v. Boston Ins. Co.*, 420 Pa. 566, 570, 218 A.2d 275, 277 (1966); *Morie v. New Jersey Mfrs. Indem. Ins. Co.*, 48 N.J. Super. 70, 76, 137 A.2d 41, 44 (1957). The foregoing principle likewise has been adopted by the majority of appellate courts of other states that have addressed the issue. As a leading insurance treatise instructs, "The insurer bears the burden of proving the applicability of policy limitations and exclusions in order to avoid an adverse judgment after the insured has sustained its burden and made its prima facie case." 19 G. Couch, *Couch on Insurance 2d*, § 79:315 (rev. ed. 1983).

By requiring Porter to prove a negative—the nonexistence of a limitation on its insurance coverage—the courts below contravened state law and thrust an unreasonable burden upon Porter with the result that, for practical purposes, the case was decided against Porter before it ever reached the jury. Moreover, the error was compounded by

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[16]The burden of proof issue is controlled by state law. Under Pennsylvania choice of law principles, it could be argued that either Pennsylvania or New Jersey law would control this issue. *See Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964); *Melville v. American Home Assurance Co.*, 584 F.2d 1306 (3d Cir. 1978). Though the parties never specifically stipulated whether Pennsylvania or New Jersey law governs the interpretation of the terms of the Policies, Transamerica never disputed Porter's assertion that the District Court was presented with a "false conflict," insofar as the law of the forum state (Pennsylvania) and the law of the alternative jurisdiction (New Jersey) do not differ. *See Complaint of Bankers Trust Co.*, 752 F.2d 874, 882 (3d Cir. 1985). References herein are primarily to Pennsylvania law, although the law of New Jersey appears to be identical.

the District Court's charge that it was Porter's burden to establish the nonexistence of an aggregate liability limit by "clear and convincing evidence," rather than by the "preponderance of the evidence" standard.

The error in the decision below is all the more glaring when the result is taken to its logical conclusion. In its Answer in the District Court, Transamerica set forth the alleged exhaustion of its policy limits as an affirmative defense. The existence and amounts of such liability limitations are essential elements of Transamerica's affirmative defense. As suggested in *Couch,* a limitation of liability should be treated in a manner analogous to policy exclusions, restrictions, and other limitations for purposes of allocating the burden of proof. "The insurer has the burden of establishing a limitation of its liability." 19 G. Couch, *supra,* § 79:417. The Third Circuit, however, approved the placing on Porter of the burden of demonstrating that an annual aggregate limitation of the insurer's liability did not exist. Thus, Porter had the burden of proving a negative and proving that Transamerica's affirmative defense had no merit. In rejecting a similar argument, the Supreme Court of Pennsylvania once explained that "it would necessarily follow that, for the same reason, [the insured would be] required to establish the nonexistence of all other stringent provisions by which the policy might be avoided." *Zenner v. Goetz,* 324 Pa. 432, 436, 188 A. 124, 126 (1936); *accord Fisher v. Fidelity Mut. Life Assoc.,* 188 Pa. 1, 13, 41 A. 467, 468 (1898). The District Court and the Court of Appeals, in the instant case, have not just refused to follow state law, they have turned the burden of proof on its head.

The foregoing principles of state law make no allowances for shifting the burden of proving an alleged

limitation of liability simply because a policy is lost. Instead, the loss of a written contract (or its unavailability at trial) at most serves only to elevate the standard of proof required of the party relying upon the instrument. The unavailability of such a "lost contract," however, does not warrant the shifting of the burden of proof.

The burden of proof decisions below establish a troubling precedent for future cases. Under the logic of the lower courts' rulings, the proponent of a lost insurance policy may be required to prove the nonexistence of whatever exclusions, exceptions, and coverage restrictions that the insurer may claim. The message sent to the insurance industry by this case is clear: in lost policy cases, raise every possible exclusion, exception and restriction to test whether the insured can prove their nonexistence by "clear and convincing" secondary evidence. More fundamentally, the decision creates a situation in which insurance companies would have an interest in *not* preserving records of their policies, because, ultimately, it will be the insured who will bear the burden of proving coverage and the absence of exclusions or limitations.

In its failure to follow established state insurance law pertaining to the applicable burden of proof and the quantum of proof necessary to satisfy that burden, the Court of Appeals disregarded numerous decisions in which this Court has held that state rules regarding burden of proof are matters of substance which federal courts must apply in diversity cases.

This Court has long recognized that the allocation of the burden of proof directly affects the substantive rights of the parties, and is not merely a matter of procedure. *See, e.g., Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 248-249 (1942); *Central Vt. Ry. v. White,* 238 U.S. 507, 511-12

(1915). As noted in *Speiser v. Randall,* 357 U.S. 513, 515 (1958), "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome."

Because of its substantive effect upon the rights of the parties, a federal court sitting in diversity must follow the applicable state law regarding burden of proof. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938). *See also, Dick v. New York Life Ins. Co.,* 359 U.S. 437, 446 (1959) ("Under the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive' . . . ."); *Cities Serv. Oil Co. v. Dunlap,* 308 U.S. 208, 212 (1939) (Burden of proof in matters affecting real estate "relates to a substantial right" and is governed by state law).

Given the quantity and clarity of state decisional authority on the burden of proof issues presented in this case, it can hardly be argued that the lower courts were confronted with a novel issue of state law. Nor can their shifting of the burden of proof be justified as an attempt to interpret the law of Pennsylvania or New Jersey as it would be interpreted by the highest courts of those states. Thus, despite the fact that the lower courts purported to be deciding issues of state law, the only plausible explanation for their action is that, in effect, a federal common law rule was devised.

The decisions of this Court clearly forbid the creation of federal common law under the circumstances presented in this case. This clear rule applies to litigation "among private parties [even though] . . . no substantial rights or duties of the United States hinge on its outcome," *Miree v. DeKalb County,* 433 U.S. 25, 31 (1977), whether or not the case involves "a significant conflict between some federal policy or interest and the use of state law." *Wallis v. Pan Am. Petroleum Corp.,* 384 U.S. 63, 68 (1966). In this case,

the lower courts were obliged to follow state insurance law pertaining to the burden of proof:

> We are reminded by the *Erie* opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.

Hanna v. Plumer, 380 U.S. 460, 471-72 (1965).

In effect, the courts below have devised federal common law regarding the burden of proof for limitations in lost insurance policy cases, which law conforms with those courts' views of the rights and liabilities of the parties, and does not conform with state insurance law. Such caprice threatens the legal relationships between insurers and insureds in asbestos cases and in cases involving similar risks.

This case demonstrates the mischief that results from a misplaced burden of proof. Because Porter could not "clearly and convincingly" establish the nonexistence of a limitation upon its liability coverage, Transamerica avoided a substantial coverage obligation which ultimately would have benefited thousands of tort claimants. A similar fate awaits other asbestos victims if this decision stands.

B. Because the District Court's Abuse of Discretion in Applying the Federal Rules of Evidence Compounded the Impact of the Erroneous Decisions Regarding the State Insurance Law Burden of Proof, this Court Should Exercise Its Supervisory Power and Reverse.

As noted before, the latent injury aspect of asbestos litigation, coupled with the vast number of asbestos claimants, has forced former manufacturers of asbestos products to rely upon their historic insurance coverage. Often the policies under which these manufacturers seek coverage have been lost or destroyed. Because there are scant surviving documents in these cases, those documents which are admitted into evidence necessarily have a highly persuasive effect on jurors. Thus, evidentiary issues such as the proper authentication of documents take on heightened importance in lost policy cases.

In the case at bar, where Porter improperly has been held to have the burden of proving the absence of a coverage limitation by clear and convincing evidence, an evidentiary issue regarding document authentication turned out to be critically important to the jury's verdict.

Transamerica's defense relied extensively upon the introduction of three documents, which Transamerica contended were copies of product liability underwriting manuals effective for the years 1951, 1952 and 1953, as prepared by the National Bureau of Casualty Underwriters (the "Bureau").

Transamerica introduced the manuals through its expert witness, Ronald Almquist. Porter made repeated objections to the introduction of the manuals on the grounds that the documents were admittedly incomplete,

materially altered and otherwise not properly authenticated. The District Court, however, abused its discretion and admitted the manuals into evidence.

Rule 901 of the Federal Rules of Evidence provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by *evidence sufficient to support* a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901 (emphasis added). Pursuant to Rule 901, Transamerica had the burden to provide "substantial evidence" from which the jury could infer that the document is genuine. *United States v. Goichman,* 547 F.2d 778, 784 (3d Cir. 1976).

Rule 901(b) provides illustrations of the means by which a proponent may provide such "substantial evidence." Of these, three are pertinent to the attempted authentication of the manuals in this case.

The first method is by the testimony of a witness with knowledge that the evidence is what its proponent claims it to be. Fed. R. Evid. 901(b)(1). Transamerica's expert witness, however, did not present any meaningful evidence establishing a *prima facie* case of authenticity, because: (1) he had no knowledge of the source of the manuals or of the manner in which they were maintained or amended; (2) Transamerica admitted that an unknown person altered the manuals by adding certain notations relating to effective dates, but its witness had no explanation relating to the alteration of the manuals; (3) after the District Court redacted the alterations, Almquist was unable to testify to the manuals' effective dates; and (4) Transamerica admitted that the manuals were incomplete.

Second, the District Court could not have properly concluded that the manuals were self-authenticating documents, that is, documents that are authenticated by virtue of their "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Fed. R. Evid. 901(b)(4). Although the documents contained a stamp which indicated that they *might* have come from the successor to the Bureau, Transamerica's witness conceded that such a conclusion would be speculation. Further, the pages of the manuals lacked internal consistency, they contained various and sundry effective dates in no particular order, and they were stamped with numbers that followed no discernible sequence or pattern. For these reasons, the authenticity of the manuals could not have been established under Fed. R. Evid. 901(b)(4).

Finally, the District Court could not have properly concluded that the manuals qualified for authentication as ancient documents. Fed. R. Evid. 901(b)(8); *see also Smythe v. Inhabitants of New Providence Township*, 263 F. 481 (3d Cir. 1920); 5 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 901(b)(8)[01](1989). Although the documents have been in existence more than twenty years, Transamerica offered no witness with knowledge of the place from which the manuals were recovered. Further, the material alterations and modifications of the manuals by unknown persons raise substantial doubts as to their authenticity, precluding any finding that they are ancient documents.

The District Court's abuse of discretion in admitting the purported underwriting manuals into evidence compounded its errors on the burden of proof, with the result that it was virtually impossible for Porter to persuade the

jury. By wrongly imposing the burden of proof on Porter, and by improperly admitting the manuals, the District Court hit Porter with a combination punch that sent Porter to the trial courtroom's "canvas."

In the exercise of its supervisory power, this Court should reverse the District Court's ruling admitting the underwriting manuals so that Porter may have a fair opportunity upon retrial of this case.

IX. CONCLUSION

For the foregoing reasons, this petition should be granted. If the Petitioner is correct in urging that the Third Circuit erroneously decided the questions presented in this petition, the matter should be remanded to the District Court for appropriate disposition.

Respectfully submitted,

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Dated: February 5, 1990

APPENDIX

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 99-3145

H. K. PORTER COMPANY, INC.

v.

TRANSAMERICA INSURANCE COMPANY

H. K. PORTER COMPANY, INC.,
a corporation,
Appellant

Appeal from the United States District Court for the Western District of Pennsylvania (Pittsburgh)
(D.C. Civil Action No. 84-00442)
District Judge: Hon. Gustave Diamond

Submitted Under Third Circuit Rule 12(6)
September 26, 1989

Before: HIGGINBOTHAM, STAPLETON and SCIRICA, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

/s/ A. LEON HIGGINBOTHAM
Circuit Judge

Attest:

/s/ SALLY MRVOS
Sally Mrvos, Clerk

(Stamped) Sept. 28, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

H.K. PORTER COMPANY, INC.,
Plaintiff,
v.
TRANSAMERICA INSURANCE COMPANY,
Defendant.

CIVIL ACTION
No. 84-442

ORDER OF COURT

AND NOW, this 27th of February, 1989, based upon the February 22, 1989, answers to the special verdict submitted pursuant Fed.R.Civ.P. 49 (a), judgment is entered declaring that the blanket liability policies bearing Policy Nos. LB 1729 and LAB 1124 issued to The Thermoid Company, the predecessor to the plaintiff, H.K. Porter Company, Inc., did not provide unlimited aggregate liability coverage for bodily injury products liability claims.

Accordingly, IT IS ORDERED that judgment be, and the same hereby is, entered in favor of the defendant, Transamerica Insurance Company, and against the plaintiff, H.K. Porter Company, Inc.

/s/ GUSTAVE DIAMOND
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

H.K. PORTER COMPANY, INC., a corporation,
Plaintiff,
v.
TRANSAMERICA INSURANCE COMPANY, a corporation,
Defendant.

CIVIL ACTION
No. 84-442

MEMORANDUM ORDER

AND NOW, this 11th day of February, 1988, upon consideration of defendant's motion to dismiss, IT IS ORDERED that defendant's motion be, and the same hereby is, denied for the following reasons:

1) This is a declaratory judgment action to determine whether defendant has an obligation under an insurance contract between it and plaintiff to defend and indemnify plaintiff for the tens of thousands of claims asserted against plaintiff by people injured by plaintiff's asbestos products. Defendant has moved to dismiss for failure to join indispensable parties—the injured claimants. *See* Fed.R.Civ.P. 19.

2) Federal law governs the necessity and indispensability of parties in diversity actions. *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 125 n.22 (1968).

3) Defendant has not carried its burden of demonstrating that the asbestos claimants are necessary for a just adjudication. *See* Fed.R.Civ.P. 19(a);

Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 16009, p. 129 (1986). Complete relief can be accorded to the parties in their absence. This case concerns the rights of parties to an insurance contract, and all parties to the contract are before the court. The claimants' interest will not be impaired in their absence. As nonparties, they cannot be bound by a judgment in this case, and as a practical matter, plaintiff, who faces depletion of its assets if defendant is held not to have an obligation to indemnify it, will defend vigorously their interest in preserving as large a fund as possible to satisfy their claims. Defendant summarily asserts that it could face multiple and inconsistent liability if the claimants are not bound by the result of this litigation. But defendant cites no law to show that the claimants have a direct action against it on an insurance contract to which they were not parties. *See Pettus v. Jones & Laughlin Steel Corp.*, 322 F.Supp. 1078, 1081 (W.D.Pa. 1971) ("Under the law of Pennsylvania, an injured person has no right of direct action against the insurer of an alleged tortfeasor unless the applicable insurance policy or a statute creates such a right."); *see also Philadelphia Electric Co. v. Leonard*, 27 D&C3d 723, 725 (Pa. 1982) (collecting cases).

4) Even if the claimants are necessary parties, their joinder is not feasible. *See* Fed.R.Civ.P. 19(b). They number at least 40,000, with more added each week. Their joinder would destroy complete diversity and defeat subject matter jurisdiction. We cannot assert personal jurisdiction over all of them.

5) Assuming the claimants are necessary parties, since the claimants' joinder is not feasible, we

must decide "whether in equity and good conscience the action should proceed among the parties before [the court], or should be dismissed, the absent party being thus regarded as indispensable." Fed.R.Civ.P. 19(b); *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108 (1968). Considering the equities and the four factors listed in Rule 19(b), we conclude that the asbestos claimants are not indispensable.

6) A judgment rendered absent the claimants would not prejudice their interests. Since they are not parties, they would not be bound. *See Provident Tradesmen*, 390 U.S. at 114. If plaintiff prevails, it has a larger fund available from which to satisfy the injured parties' claims. True, if H.K. Porter loses in this action, the fund of money to satisfy claims will be lesser, but H.K. Porter, who must satisfy those claims or enter bankruptcy, has great incentive to protect the claimants' interest in this action. A judgment rendered absent the claimants will be adequate. *See* para. 3, *supra* (rejecting defendant's claim of multiple liability); *ACandS, Inc. v. Aetna Casualty & Surety Co.*, 764 F.2d 968 (3d Cir. 1985) (adjudicating declaratory judgment action between asbestos manufacturer and insurer without joinder of victims).

7) If this action is dismissed for nonjoinder, plaintiff has no other adequate remedy. No court could assert personal and subject matter jurisdiction over all these claimants. Their number would make any action to which they are parties unmanageable and unsettleable. *See Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, 1 Mealey's Lit. Rep. (Insurance) 202 (D.C. Cir. Feb. 14, 1986) (unpublished opinion); *cf. Maryland Casualty Co. v. Consumers Finance*

Service, 101 F.2d 514, 151-16 (3d Cir. 1938) (error to dismiss declaratory judgment action between insured and insurer on the mistaken premise that personal injury action against insured could give the parties adequate relief).

8) Finally, in the exercise of our discretion, we cannot ignore the untimeliness of this motion. Defendant made it 26 months after filing its answer, 14 months after the filing of pretrial narratives and 13 months after this case was placed on our trial list. To excuse this, defendant claims that it relies on a decision recently rendered by the court of appeals, *Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345 (3d Cir. 1986). However, this case was decided 11 months before defendant's motion. Moreover, it is evident from defendant's brief that the primary support for its motion is *Vale Chemical Co. v. Hartford Accident & Indemnity Co.*, 512 Pa. 290, 516 A.2d 684 (1986). *Vale* was decided more than a year before this motion, and by defendant's own assertions in its brief, *Vale* followed established Pennsylvania law going back *20* years. *See* Defendant's Notice of Motion and Motion to Dismiss, p. 5.

9) *Federal Kemper Insurance Co. v. Rauscher*, 807 F.2d 345 (1st Cir. 1986), is distinguishable. There, the court of appeals held that the injured parties had standing in a declaratory judgment action by an insurer even after the insured had been dismissed from the action. In dicta, the court opined that the injured parties were indispensable under Rule 19. *See* 807 F.2d at 354 ("Although it is not necessary to our analysis or conclusion . . . ."). This dicta turned in part on the Pennsylvania No-Fault Insurance law, which authorizes direct actions by injured parties against insurers. The

court noted that absent statutory authorization, Pennsylvania law does not permit direct actions by injured parties against insurers. *Id.* at 354 n.6. There is no analogous statute in the present case. Moreover, the determination that a person is indispensable is an equitable determination that turns on the facts of each case. The facts of *Rauscher*, in which the insured had defaulted leaving no one to protect the injured parties' interests and in which there were only two injured parties, differ markedly from this case in which there are at least 40,000 injured parties and a determined plaintiff.

/s/ GUSTAVE DIAMOND
United States District Judge

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United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 89-3145

H. K. PORTER COMPANY, INC.

v.

TRANSAMERICA INSURANCE COMPANY

H. K. PORTER COMPANY, INC., a corporation,

Appellant

(D.C. Civil No. 84-00442)

SUR PETITION FOR REHEARING
Filed Nov. 9, 1989

Present: GIBBONS, *Chief Judge,* HIGGINBOTHAM, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, *Circuit Judges.*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges

of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ A. LEON HIGGINBOTHAM
Circuit Judge

Dated: Nov. 9, 1989